

1 Jeffrey S. Niesen
2 1411 W. Pinehill Rd
3 Spokane WA 99218
4 Telephone: (509) 822-7140
Email: jsniesen1@yahoo.com

5
6
7
8 UNITED STATE DISTRICT COURT
9 EASTERN DISTRICT OF WASHINGTON

10 UNITED STATES OF AMERICA,
11 Plaintiff,
12
13 v.
14 ALEXIS GARCIA PALOMINO
15 Defendant

4:15-CR-06049-EFS-4
MEMORANDUM RE: SPEEDY
TRIAL ISSUES

17
18 ALEXIS PALOMINO, through counsel Jeffrey Scott Niesen in
19 accordance with the Court's briefing order submits the following on the
20 Speedy trial issue raised *sue sponte* by the Court. "Under the Speedy Trial
21 Act a defendant must be brought to trial within 70 days from the filing date
22 of the information or indictment, or from the date the defendant appeared
23 before a judicial officer of the court in which such charge is pending,
24 whichever date last occurs." *U.S. v. Duque*, 62 F.3d 1146, 1149 (9th Cir.
25 1995); citing 18 U.S.C. § 3161(c)(1).
26
27
28

1 /

2 I. STANDARDS OF REVIEW

3 “We review the district court's disposition of a Speedy Trial Act issue for
4 clear error as to factual findings and de novo as to application of legal
5 standards.” *United States v. Brickey*, 289 F.3d 1144, 1150 (9th Cir.2002)
6 (internal quotation marks omitted).

7

8

9

10 II. FACTS

11 On December 16, 2015 the United States indicted Alexis Garcia
12 Palomino as the fourth defendant alleging his involvement in a drug
13 conspiracy with Jese Casillas. On September 7, 2016 the United States
14 filed its first superseding indictment again naming Palomino as a co-
15 conspirator in the overall conspiracy. (ECF 67). In an Order dated October
16 3, 2016 the Court declared the entire case complex and set a trial date in
17 October 2018 (ECF 101). A Second Superseding Indictment was filed and
18 Defendant Palomino was arrested and arraigned March 28, 2018 on that
19 Indictment.

20

21 A status conference was held and March 29, 2018 the Court stated as
22 follows:

23

24 “Pursuant to 18 U.S.C. Sec. 3161 (h) (7) (B) (i), (iii) and (iv), the
25

26 Court **DECLARES EXCLUDABLE from Speedy Act calculations**

1 the period from **March 29, 2018**, the date of this Order, though
2 **October 10, 2018**, the new trial date, as the period of delay granted
3 foe adequate preparation by counsel as to Defendant Palomino only".
4
(ECF 740).

5
6 On May 14, 2018 Palomino filed a motion for a continuance of
7 his trial. (ECF 774)

8
9 On May 30, 2018 the Court entered an order severing Palomino
10 and a later appearing co-defendant from the October 10, 2018 trial and
11 directed them to meet with government counsel to work out agreed
12 case management dates including a date for trial. (ECF 802) . The
13 parties recommended a trial date of March 25, 2019, which was
14 ordered by the Court. (ECF 802).

15
16 While it was not specifically set forth, it was the understanding of
17 counsel that case had been declared complex and that the continuance
18 was granted so that counsel would have sufficient time to review
19 discovery, prepare motions and prepare for trial.

20
21 III. DISCUSSION

22
23
24 "The Sixth Amendment guarantees that, 'in all criminal
25 prosecutions, the accused shall enjoy the right to a speedy ...trial....'"
26
27 *Doggett v. U.S.*, 505 U.S. 647, 651 (1992). The Supreme Court looks to
28 four separate enquiries: (1) whether delay before trial was uncommonly

1 long, (2) whether the government or the criminal defendant is more to
2 blame for that delay, (3) whether the defendant asserted his right to a
3 speedy trial, and (4) whether he suffered prejudice as the delay's result.

4
5 *Id.*; see *Barker v. Wingo*, 407 U.S. 514, 530 (1972).

6
7 This case does not meet the first enquiry because the delay between
8 accusation and trial is not presumptively prejudicial to Mr.Palomino . The
9 initial trial date in this case was set within a few days after Mr. Palomino
10 was arraigned. He subsequently requested a continuance of the trial ro allow
11 counsel sufficient time to properly prepare.”

12
13 The Speedy Trial Act has numerous exclusions from the computation of
14 the 70-day period, including time designated for transport of defendants and
15 for the preparation and hearing of motions. *Id.* These exclusions apply to all
16 co-defendants in a case. *Id.*; citing *U.S. v. Butz*, 982 F.2d 1378, 1381 (9th
17 Cir.), *cert. denied*, 114 S.Ct. 250 (1993). “When a superseding indictment
18 contains charges which must be joined with the original charges, Speedy
19 Trial Act calculations begin from the date of the original indictment.” *Id.*
20 citing *U.S. Clymer*, 25 F.3d 824, 827 n.2 (9th Cir. 1994). Essentially, the new
21 charges would retain the original Speedy Trial clock.

22
23
24 The main exclusion of concern is 18 U.S.C. § 3161(h)(7)(ii) that in
25 the ends of justice served by the granting of a continuance outweighs the
26 best interests of the public and the defendant in a speedy trial. The factor set

1 out in section (ii) states: “Whether the case is so unusual or so complex, due
 2 to the number of defendants, the nature of the prosecution, or the existence
 3 of novel questions of fact or law, that it is unreasonable to expect adequate
 4 preparation for pretrial proceedings or for the trial itself within the time
 5 limits established by this section.” 18 U.S.C. §3161(h)(7)(ii).
 6

7 “If any indictment or information is dismissed upon motion of the
 8 defendant, or any charge contained in a complaint filed against an individual
 9 is dismissed or otherwise dropped... and thereafter... an information or
 10 indictment is filed charging such defendant with the same offense or an
 11 offense based on the same conduct... [the Speedy Trial Act clock starts
 12 fresh].” *Id.* at 1150; citing 18 U.S.C. § 3161(b)(1); *see also U.S. v. McCown*,
 13 711 F.2d 1441, 1446 (9th Cir. 1983 (when indictment dismissed on defense
 14 motion “any subsequent step toward prosecution causes the time period to
 15 begin running anew.”). “If the indictment is dismissed at the government’s
 16 behest, on the other hand, and thereafter a charge is filed against the
 17 defendant for the same offense, or any offense required to be joined with
 18 that offense, any period of delay from the date the charge was dismissed to
 19 the date the time limitation would commence to run as to the subsequent
 20 charge had there been no previous charge [is tolled].” *Id.*; citing 18 U.S.C. §
 21 3161(b)(1); *see also U.S. v. Feldman*, 788 F.2d 544, 548 (9th Cir. 1986), *cert*
 22 *denied*, 479 U.S. 1067, (1987) (citation omitted).
 23
 24
 25
 26
 27
 28

1 “*The text of the statute, as well as Ninth Circuit case law, thus suggest*
2 *that the identity of the author of the motion for dismissal is paramount in*
3 *determining whether the clock should be restarted or merely tolled.”* *Id.* at
4 1150.; *see Feldman*, 788 F.2d at 549 (noting that 18 U.S.C. § 3161(d)(1)
5 may apply “to any manner of dismissal of an indictment except on the
6 government’s own motion,” and should apply where the defendant rather
7 than the government benefits from the dismissal); *see also McCown*, 711
8 F.2d 1446.

In the present case, Mr. Palomino has not moved the Court for dismissal of the indictment based upon the Speedy Trial Act. Neither party benefits from a dismissal of the indictment, because the Government can either re-indict the case or supersede, thereby bringing this case back to square one. Counsel believes that the speedy trial clock has not run due to the entire case being declared complex, that ECF 101 binds Mr. Palomino even though he appeared subsequently and the fact that a motion to continue the trial was filed.. The complexity of this case derives from the significant amount of discovery and trial preparation involved. Mr. Palomino did not disagree with the March 25, 2019, trial date and does not believe there are any speedy trial issues based upon the above.

Dated this 18th day of January 2019.

Respectfully Submitted,

1 s/Jeffrey Niesen _____
2 WSBA # 33850
3 Attorney for Defendant Palomino
4
5
6
7
8

CERTIFICATE OF SERVICE

9 I hereby certify that on January 18, 2018, I electronically filed the
10 foregoing with the Clerk of the Court using the CM/ECF System which will
11 send notification of such filing to the following: Assistant United States
12 Attorney Stephanie Van Marter.
13
14

15 s/Jeffrey S, Niesen _____
16 WSBA # 33850
17 Attorney for Alexis Garcia Palomino
18
19
20
21
22
23
24
25
26
27
28